

Dang (Migration) [2023] AATA 1941 (16 May 2023)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Hong Luan Dang
CASE NUMBER:	1825934
HOME AFFAIRS REFERENCE(S):	BCC2014/711937
MEMBER:	Moira Brophy
DATE:	16 May 2023
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal affirms the decision not to grant the applicant a Partner (Residence) (Class BS) visa.

Statement made on 16 May 2023 at 2:09pm

CATCHWORDS

MIGRATION – Partner (Residence) (Class BS) visa – Subclass 801 (Spouse) – relationship with sponsor had ceased – sponsorship had been withdrawn – not satisfied that at the time of this decision, the applicant is the spouse of the sponsor – not a genuine spousal relationship – decision under review affirmed

LEGISLATION

Migration Act 1958, ss 5, 65

Migration Regulations 1994, Schedule 2, cls 801.211, 801.221

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Home Affairs on 28 August 2018 to refuse to grant the applicant a Partner (Residence) (Class BS) visa under s 65 of the *Migration Act 1958* (Cth) (the Act).
2. The applicant applied for the visa on 12 March 2014 on the basis of his relationship with his sponsor. At that time, Class BS contained only one subclass: Subclass 801 (Partner). The criteria for the grant of this visa are set out in Part 801 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the applicant did not satisfy cl 801.221(2) because while the parties claimed to be in a continuing relationship, they had provided inconsistent statements at time of interview and made several claims that were not supported by the evidence.
4. The applicant appeared before the Tribunal on 10 May 2023 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Vietnamese and English languages.
5. For the following reasons, the Tribunal has concluded that the **decision under review should be affirmed**.

6. Background

7. The applicant, Mr Hong Luan Dang, is a 34-year-old male from Vietnam, currently residing in Sydney. His parents and one brother are residing in Vietnam.
8. The applicant arrived in Australia on 18 November 2012 as the holder of a TU 573 (Higher Education) visa.
9. According to their application, the applicant and the sponsor of his application, Ms Victoria Uyen Nguyen commenced living together on or about 19 January 2014 being the date they married. They lodged their application for a Partner (Temporary) (Class UK) (subclass 820) and a Partner (Residence) (Class BS) (Subclass 801) visa on 12 March 2014. The applicant was granted a Subclass 820 visa on 18 February 2015.
10. On 16 June 2017 the applicant was asked to provide further documentation. Responses were received on 29 March 2017, 12 April 2017, and 19 April 2017.
11. A telephone interview was conducted on 13 July 2018.
12. Following the telephone interview, a natural justice letter was sent to the applicant, and he responded on 10 August 2018.
13. On 28 August 2018 the delegate refused the application on the basis the applicant did not satisfy cl 801.221 because the delegate was not satisfied cl 801.221 was met at the time of decision because he was not satisfied the parties were in a genuine and continuing relationship. While the parties claimed to be in a continuing relationship, they had provided inconsistent statements at time of interview and made several claims that were not

supported by the evidence. The delegate had not been persuaded by the explanations provided when these matters had been raised.

14. The applicant lodged an application for review of the delegate's decision at the Administrative Appeals Tribunal (the Tribunal).
15. A copy of that decision has been provided to the Tribunal by the applicant.
16. On 25 August 2022 the applicant was asked to provide further information and documentation to support the financial, social, household and commitment aspects of the relationship.
17. On 14 September 2022 the applicant provided documentation including:
 - Submission;
 - Form 888;
 - Residential Tenancy Agreement;
 - Various receipts in the name of the applicant and the sponsor;
 - Joint health insurance cover;
 - Car registration and insurance; and
 - Tax assessments.
18. On 13 April 2023 the Tribunal wrote to the applicant, noting that in his submission dated 12 September 2022 he had indicated he was no longer in a relationship with his sponsoring partner. He was advised as follows:

If you are no longer in a relationship, there are exceptions under which you can be granted the Partner visa. These include:

 - The sponsoring partner has died;
 - The applicant or dependent child is the victim of family violence committed by the sponsoring partner; and
 - The applicant and sponsoring partner share custody, access, or maintenance obligations in respect of any dependent children.

You are invited to provide information in writing that may indicate you are the spouse or de facto partner of the sponsoring partner at present, or alternatively, any information that you believe maybe relevant to the exceptions.

CONSIDERATION OF CLAIMS AND EVIDENCE

Is the applicant sponsored?

19. The issue in the present case is whether any of the relevant exceptions relating to circumstances where a spousal relationship may have broken down apply and the applicant can meet the criteria notwithstanding.

20. Relevantly to this matter, cl 801.221(2)(c) requires that at the time of this decision, the applicant is the spouse of the 'sponsoring partner', who must be an Australian citizen or Australian permanent resident or an eligible New Zealand citizen who was specified in the Subclass 820 visa application as the spouse or de facto partner of the applicant. In the present case, the applicant no longer claims to be the spouse of the sponsor as their relationship has broken down irretrievably.
21. Exceptions apply in certain circumstances where the sponsor has died, or family violence has occurred, or a child is involved.
22. **Is the visa applicant in a spousal relationship with the sponsor?**
23. The applicant sought the visa on the basis of his relationship with the sponsor. Information on the Tribunal's file indicates that the applicant's relationship with the sponsoring partner had ended, and that the sponsorship had been withdrawn. The Tribunal put this information to the applicant pursuant to s 359AA of the Act seeking his comments on that information. In response, the applicant confirmed that he was no longer in a relationship with the sponsor. He stated the parties had separated on or about April or May 2018 and have not lived together since that time. The Tribunal put to the applicant that in his submission to the Tribunal dated 12 September 2022, he had claimed his relationship with the sponsor broke down during Covid in 2020. The applicant said they had tried to patch things up, but it had not worked. It was his submission that the visa should be granted in that had his application been determined in a timely manner, he would have been granted the visa as the relationship was still on foot at that time.
24. On the evidence before it, the Tribunal makes the following findings.
25. There is no evidence that at present, the applicant and the sponsor continue to live together or not apart on a permanent basis or that they maintain a joint household or share housework. There is no evidence that they share their finances, have joint liabilities, or jointly contribute to expenses. There is no evidence that the applicant and the sponsor continue to represent themselves to others as being in a relationship or that they socialise together. There is no evidence that there continues to be a mutual commitment to the relationship or that the parties draw companionship and support from each other.
26. The Tribunal is not satisfied on the limited evidence before it that at the time of this decision, the applicant and the sponsor have a mutual commitment to a shared life to the exclusion of all others. The Tribunal is not satisfied their relationship is genuine and continuing. The Tribunal is not satisfied that at the time of this decision, the applicant is the spouse of the sponsor.
27. There is no evidence before the Tribunal that the sponsor has died. There is no evidence in relation to any family violence.
28. There is no evidence that the applicant has a biological child with the sponsor or that there are relevant court orders or responsibilities in relation to a child in respect of whom the sponsoring partner also has the relevant court orders or responsibilities under the *Family Law Act 1975* (Cth). The Tribunal is not satisfied the applicant meets the exceptions in cl 801.221.
29. Accordingly, on the evidence before it, the Tribunal is not satisfied that the applicant meets the requirements in cl 801.221.
30. For the reasons above, the applicant does not satisfy the criteria for the grant of the visa.

DECISION

31. The Tribunal affirms the decision not to grant the applicant a Partner (Residence) (Class BS) visa.

Moira Brophy
Member